IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
May 7, 2002 Session

STATE OF TENNESSEE v. JAMES STACEY CARROLL

Direct Appeal from the Circuit Court for Carroll County
No. 01CR-1634 C. Creed McGinley, Judge

No. W2001-01464-CCA-R3-CD - Filed August 9, 2002

The Appellant, James Stacey Carroll, was convicted by a Carroll County jury of the following offenses: (1) violation of the Motor Vehicle Habitual Offenders Act; (2) driving under the influence of an intoxicant, sixth offense; and (3) driving on a revoked license. The trial court sentenced Carroll, as a multiple offender, to four years in the Department of Correction for the habitual offender conviction and to eleven months, twenty-nine days for the DUI conviction. On appeal, Carroll raises the following issues for our review: (1) whether the evidence presented at trial was sufficient to support Carroll's convictions for driving while a motor vehicle habitual offender and for driving under the influence of an intoxicant; (2) whether the statutory provisions of Tennessee Code Annotated §§ 55-10-613, -615, -616 of the Motor Vehicle Habitual Offenders Act are unconstitutional; (3) whether the trial court erred by admitting the results of Carroll's blood alcohol test into evidence; (4) whether the trial court erred by allowing Deputy Verner to testify about Carroll's verbal consent to a blood alcohol test; and (5) whether the trial court's scheduling order violated Carroll's procedural and substantive due process rights. After review, we find no error and affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed.

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Benjamin S. Dempsey, Huntington, Tennessee, for the Appellant, James Stacey Carroll.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; John H. Bledsoe, Assistant Attorney General; G. Robert Radford, District Attorney General; and Eleanor Cahill, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

On August 21, 2000, during the late afternoon hours, Justin Pugh was proceeding along Highway 77A in Carroll County when he noticed a truck traveling in front of him "weaving back and forth across the road . . . from one side of the road all the way almost off the edge back to the other." Pugh testified that this erratic driving continued for almost two miles before he observed the truck leave the right side of the road, come back across the pavement, and hit the embankment on the left side of the highway. Pugh immediately stopped his vehicle and approached the wrecked truck. Inside, he found the Appellant who had some cuts on his head and complained of chest pain. Pugh saw no other passengers in or around the vehicle and testified that the Appellant remained lucid and coherent throughout the event. About five minutes later, as Pugh and the Appellant waited for emergency assistance, volunteer firefighters, Adam Martin and Ricky Simco, happened upon the scene and stopped to assist. Both Martin and Simco testified that the Appellant was coherent and appeared to only suffer from minor injuries.

Bill Miller, a paramedic with Huntingdon Emergency Medical Service, also arrived at the scene shortly thereafter. Upon arriving, Miller noticed that the Appellant's judgment was slightly impaired and testified that he felt alcohol might have been involved since he kicked an "alcoholic can or bottle" out of the way as he was proceeding to the wrecked vehicle. Miller testified that, although the Appellant was not as quick to respond to questioning as he should be, he did comprehend what was taking place and never appeared unconscious.

Deputy Michael Ray Verner of the Carroll County Sheriff's Department was also dispatched to the scene. Verner noticed an odor of alcohol on the Appellant's breath and testified that the Appellant's speech was slurred. Verner observed beer cans in the back of the truck and in the surrounding ditch. Verner followed the ambulance to Methodist Hospital in McKenzie, where he obtained a verbal consent from the Appellant to obtain a blood alcohol sample. Brenda Hyde, a medical technician at Methodist Hospital, also testified that she overheard the Appellant voluntarily consent to the blood alcohol test. The Appellant's blood sample was later tested and revealed a blood alcohol concentration of .15%.

At trial, Kathy Carroll, the Appellant's wife, testified that she was the driver of the vehicle on that particular day when it wrecked. According to Ms. Carroll, she lost control of the vehicle when she dropped a cigarette, causing her to leave the roadway. She related that Willie and Shirley Robinson happened upon the scene, and she rode with them to her mother's house to get help because the Appellant was so badly injured. When Carroll arrived at her mother's house, she did not awaken her mother but instead took the car out of the driveway. Carroll drove the car to a gas station, where she filled the tank with gasoline before returning to the scene. When she finally returned to the accident scene, Carroll testified that no one was present and that the wrecked truck was gone. After searching various hospitals, she found her husband hospitalized in McKenzie.

ANALYSIS

I. Sufficiency of the Evidence

A jury conviction removes the presumption of innocence with which a defendant is cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Likewise, it is not the duty of this court to revisit questions of witness credibility on appeal, that function being within the province of the trier of fact. *See generally State v. Adkins*, 786 S.W.2d 642, 646 (Tenn. 1990); *State v. Burlison*, 868 S.W.2d 713, 718-19 (Tenn. Crim. App. 1993). Instead, the defendant must establish that the evidence presented at trial was so deficient that no rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994), *cert. denied*, 513 U.S. 1086, 115 S. Ct. 743 (1995). The State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992), *cert denied*, 507 U.S. 954, 113 S. Ct. 1368 (1993).

A. Motor Vehicle Habitual Offender

Tennessee Code Annotated § 55-10-616(a) provides that it is "unlawful for any person to operate any motor vehicle in this state while the judgment or order prohibiting the operation remains in effect." In this case, the Appellant contends that the evidence presented was insufficient to support his conviction for driving while an habitual motor offender. We disagree. The Appellant's sufficiency argument centers upon his assertion that the proof fails to establish his operation of a vehicle on this date was a knowing and intentional violation of the court's order. The Appellant asserts that the May 13, 1996 order prohibited his operation of a vehicle for only a three-year period. Thus, it is the Appellant's contention that the date of this offense, August 21, 2000, was beyond the three-year period; therefore, "there was no proof that [he] was aware that the criminal proscriptions of the statute applied beyond the specified three-year period . . . ."

On May 13, 1996, the Appellant was declared an habitual offender by the Carroll County Circuit Court. In its order, the court revoked the Appellant's driving privileges and directed that, "the privilege of the [Appellant] to operate a motor vehicle in the State of Tennessee is revoked until further orders of this Court . . . before the driving privileges of the [Appellant] may be reinstated he must petition this court after three (3) years from the date of entry of this order, and this court must enter an order reinstating his/her driving privileges." As noted above, the trial court specifically provided in its order declaring the Appellant an habitual offender that his license to operate motor vehicles in this state was revoked "until further orders of this court" and only after the three-year period had expired. We conclude that the language contained in the court's order pronounces, with unmistakable clarity, that the Appellant was not entitled to operate a motor vehicle while the order prohibiting such operation remained in effect. This issue is without merit.

B. Driving Under the Influence

The Appellant also contends that the evidence presented at trial is insufficient to support his conviction for driving while under the influence of an intoxicant. Specifically, he contends that "no law enforcement officer observed [the Appellant] consuming any type of alcoholic beverages . . . or operating the motor vehicle." Our law provides that it is unlawful for any person to drive or to be in physical control of any automobile or other motor vehicle driven on any of the public roads or highways of the state while the alcohol concentration in such person's blood or breath is ten hundredths of one percent (.10%) or more. Tenn. Code Ann. § 55-10-401(a)(2).

In the present case, Pugh testified that he observed the Appellant's vehicle swerve all over the road for approximately two miles. After the Appellant crashed his truck, Pugh immediately offered assistance and recalled that no other persons were in the truck or at the scene. Volunteer firefighters, emergency personnel, and police also testified that the Appellant appeared to be the only person involved in the incident. Beer cans or bottles were found at the scene and the Appellant's blood alcohol concentration at the time of the wreck was .15%. The jury obviously rejected, as is their prerogative, the Appellant's assertion that his wife was driving the truck at the time it wrecked. Factual disputes within the evidence are questions for jury resolution and will not be disturbed by this court. We conclude that the evidence presented at trial, viewed in the light most favorable to the State, is more than sufficient for a rational jury to find the Appellant guilty of driving while under the influence of an intoxicant. This issue is also without merit.

II. Constitutionality of the Motor Vehicle Habitual Offender Statute

The Appellant next asserts that certain sections of the motor vehicle habitual offender statutes are unconstitutional. Specifically, he challenges Tennessee Code Annotated §§ 55-10-613, -615, -616, arguing that the construction and application of these code sections should be found "void for vagueness, over broad and/or creates a cruel and impermissible criminal penalty, lasting indefinitely without fair notice." In other words, the Appellant argues that the statutory language is vague and fails to give clear warning that an habitual offender will remain in such status until he or she petitions the court for reinstatement of his or her driving privileges after the three-year mandatory suspension period. The Appellant also argues that the trial court's order declaring him a habitual motor vehicle offender is unconstitutional because "it exceeds the jurisdiction and scope of the statute." We disagree.

In his first issue, the Appellant contends that certain provision of the Motor Vehicle Habitual Offender Act are unconstitutionally void due to vagueness. Specifically, he challenges Tennessee Code Annotated § 55-10-615(a) and (b) which provide:

> (a) In no event shall a license to operate motor vehicles in this state be issued to an habitual offender for a period of three (3) years from the entry date of the order of the court finding such person to be an habitual offender.

> (b) At the expiration of three (3) years from the date of any final order of a court, entered under the provisions of this part, finding a person to be an habitual offender and directing such person not to operate a motor vehicle in this state, such person may petition the court where found to be an habitual offender or any court of record having criminal jurisdiction in the county in which such person then resides, for restoration of the privilege to operate a motor vehicle in this state. Upon such petition, and for good cause shown, such court may, in its discretion, restore to such person the privilege to operate a motor vehicle in this state upon such terms and conditions as the court may prescribe, subject to other provisions of law relating to the issuance of operators' or chauffeurs' licenses.

Initially, we note that when reviewing a statute for a possible constitutional infirmity, we are required to indulge every presumption and resolve every doubt in favor of the constitutionality of the statute. *Petition of Burson*, 909 S.W.2d 768, 775 (Tenn. 1995). To survive a challenge for vagueness, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *State v. Lakatos*, 900 S.W.2d 699, 701 (Tenn. Crim. App. 1994), *perm. to appeal denied*, (Tenn. 1995) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298 (1972)). A statute is void for vagueness if it so vague, indefinite, and uncertain that persons must speculate as to its meaning. *State v. Whaley*, 982 S.W.2d 346, 348 (Tenn. Crim. App. 1997). Nonetheless, the vagueness doctrine does not invalidate every statute which a reviewing court believes could have been drafted with better precision. *State v. Lyons*, 802 S.W.2d 590, 592 (Tenn. 1990). In other words, this court must determine legislative intent "from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning." *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000).

The Appellant, who was driving more than four years after having been declared a motor vehicle habitual offender, contends that these guidelines in the Act are so vague that he was not given "clear warning of action for which [he] might be [held] accountable." We disagree. Tennessee Code Annotated § 55-10-616 provides that "it shall be unlawful for any person to operate any motor vehicle in this state while the judgment or order of the court prohibiting the operation remains in effect." It is a basic principle of due process that an enactment will be declared void for vagueness if its prohibitions are not clearly defined. In this case, however, the statutory language is clear and unambiguous. A person of ordinary intelligence is not forced to guess or speculate about its meaning. Rather, it is very clear that these statutes, taken together, prohibit anyone who has been declared a motor vehicle habitual offender to operate a motor vehicle at any time until he or she properly applies for and is restored driving privileges by the court. Moreover, we note that in *State v. Orr*, 694 S.W.2d 297, 298 (Tenn. 1985), our supreme court found the Tennessee Motor Vehicle Habitual Offenders Act constitutional. *See also State v. Hinsley*, 627 S.W.2d 351, 354 (Tenn. 1982). Thus, this issue is without merit.

Secondly, the Appellant contends that the Motor Vehicle Habitual Offenders Act is unconstitutional because it constitutes cruel and unusual punishment. Specifically, he contends that the Act makes his habitual status indefinite. Thus, he maintains that the statute is open-ended and subject to discriminatory and arbitrary enforcement. Again, we disagree. The argument that the Act constitutes cruel and unusual punishment has previously been rejected by our supreme court and we see no need to revisit that issue here. *State v. Orr*, 694 S.W.2d 297, 298 (Tenn. 1985); *see also State v. Jones*, 592 S.W.2d 906 (Tenn. Crim. App. 1979); *State v. Ermon C. Coffey*, 1985 Tenn. Crim. App. LEXIS 2635 (Tenn. Crim. App. at Knoxville, Apr. 3, 1985). This issue is also without merit.

III. ADMISSION OF BLOOD ALCOHOL CONCENTRATION

The Appellant next argues that the trial court erred by allowing the admission of his blood alcohol test results into evidence. Specifically, the Appellant argues that he did not voluntarily consent to the blood alcohol test and that the test was administered when he was "incapable of knowingly consenting, based upon his injuries."

The administration of a breath test for the detection of a person's blood alcohol level is a seizure of the person and a search for evidence within the purview of the Fourth Amendment of the United States Constitution. *State v. Humphreys*, 70 S.W.3d 752, 760 (Tenn. Crim. App. 2001) (citing *State v. Michael A. Janosky*, No. M1999-02574-CCA-R3-CD (Tenn. Crim. App. at Nashville, Sept. 29, 2000)). The analysis of any warrantless search must begin with the proposition that such searches are *per se* unreasonable under the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution, subject only to a few well-delineated exceptions. One such exception to the warrant requirement includes exigent circumstances. Based upon the fact that evidence of blood alcohol content begins to diminish shortly after drinking stops, a compulsory breath or blood test, taken with or without the consent of the donor, falls within the exigent circumstances exception to the warrant requirement.

In addition to the exigent circumstances established by the nature of the evidence in cases involving intoxicated motorists, the statutorily created implied consent of the motorist permits the warrantless search of the motorist's breath or blood. Under the express provisions of Tennessee Code Annotated § 55-10-406, "[a]ny person who drives any motor vehicle in the state is deemed to have given consent" to a test for blood alcohol or drug content, provided that the law enforcement officer has "reasonable grounds to believe such person was driving under the influence of an intoxicant or drug." Thus, anyone who exercises the privilege of operating a motor vehicle in this state has consented in advance to submit to an alcohol test. Indeed, by virtue of the provisions of Tennessee Code Annotated § 55-10-406(a)(1), our legislature has declared that consent of all motorists is implied. Therefore, if probable cause exists to believe that: (1) the suspect motorist has consumed intoxicating liquor; and (2) evidence of the motorist's intoxication will be found if the blood is tested, . . . it is unnecessary for law enforcement officers to obtain the voluntary consent of an individual motorist before administering a breath test for alcohol concentration level.

Additionally, a motorist's right to refuse to submit to a breath test under Tennessee's implied consent law is not a constitutional right. Rather, the State of Tennessee, through its enactment of Tennessee Code Annotated § 55-10-406(a)(2) and (a)(3), has adopted a policy position prohibiting law enforcement officers from administering a breath or blood alcohol test against the motorist's will. Instead, in an effort to avoid potentially violent confrontations between private citizens and law enforcement officers, the State has elected to permit the motorist to refuse the test. The right to refuse is not absolute; rather, the right to refuse will result in suspension of the motorist's driver's operator's license, assuming appropriate procedural protections are provided. *See* Tenn. Code Ann. § 55-10-406(b); *Humphreys*, 70 S.W.3d at 761; *Michael A. Janosky*, No. M1999-02574-CCA-R3-CD. Indeed, § 55-10-406(a)(2) of the Tennessee Code Annotated provides:

> Any law enforcement officer who requests that the driver of a motor vehicle submit to a test pursuant to this section for the purpose of determining the alcoholic . . . content of the driver's blood shall, prior to conducting such test, advise the driver that refusal to submit to such test will result in the suspension of the driver's operator's license by the court. The court having jurisdiction of the offense for which such driver was placed under arrest shall not have the authority to suspend the license of a driver who refused to submit to the test if such driver was not advised of the consequences of such a refusal.

In the present case, the Appellant, by choosing to engage in the regulated activity of driving a motor vehicle, subjected himself to the provisions of Tennessee Code Annotated § 55-10-406. The Appellant's driving behavior, his slow responses to questioning, the odor of alcohol on his breath, and the empty beer cans found in and around his vehicle satisfactorily formed the factual bases for the officer's inference that the blood test was likely to reveal evidence of the offense. The Appellant presented no evidence of his express refusal to submit to the blood test. To the contrary, Deputy Verner testified that he did receive the Appellant's verbal consent to administer the blood alcohol test. Deputy Verner also informed the Appellant that he had the right to refuse the test but would lose his driver's license for one year if he did, in fact, refuse testing. While Deputy Verner did not obtain a written consent from the Appellant, oral consent was given by the Appellant in the presence of lab technician, Brenda Hyde, who corroborated Deputy Verner's testimony that the consent was voluntarily given.

Additionally, there is nothing in the record which establishes that the Appellant was unable to refuse the test. There was ample witness testimony that the Appellant was conscious and capable of understanding the events surrounding him after the accident. Our law is clear that the only time "the test shall not be given" is when the motorist "refuses to submit" to the test. There is simply no proof that the Appellant refused to submit to the testing. Thus, the trial court did not err by allowing the blood alcohol test results into evidence. This issue is without merit.

IV. DISCOVERY VIOLATION

The Appellant maintains that the State violated Rule 16(a)(1)(A), of the Tennessee Rules of Criminal Procedure, by failing to provide in its discovery response information about the Appellant's alleged verbal consent to blood alcohol testing. The Appellant insists that such admission was prejudicial to him in his preparation for trial because he was unaware that a verbal consent allegedly existed and was thus unable to interview other potential witnesses about emergency room communications or ask other potential witnesses about his physical condition at the time consent was allegedly given.

Rule 16(a)(1)(A), of the Tennessee Rules of Criminal Procedure, provides in relevant part as follows:

> Upon request of a defendant the state shall permit the defendant to inspect and copy or photograph: *any relevant written or recorded statements* made by the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney general; the substance of any oral statement which the state intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to *interrogations* by any person then known to the defendant to be a law-enforcement officer . . .

Tenn. R. Crim. P. 16(a)(1)(A) (emphasis added). In his brief, the Appellant cites only to the first part of Rule 16(a)(1)(A), which refers to the production of "any relevant written or recorded statements." After reviewing the record in this case, however, we have found no evidence that the alleged oral consent given to Deputy Verner by the Appellant was ever reduced to writing or recorded in any manner.[1] Likewise, we find that the Appellant was not in a custodial environment or being interrogated at the time Deputy Verner asked him to consent to the blood test. Thus, pursuant to Tenn. R. Crim. P. 16(a)(1)(A), the State had no obligation to furnish information concerning the oral statement made to Deputy Verner in discovery, as there is no evidence that the Appellant was subject

[1]The Appellant also seems to imply that the testimony at trial is "irreconcilable" because Ms. Hyde testified that there was a written form and the State never produced it. During trial, Ms. Hyde testified that she "thought" the Appellant signed a consent form to have blood withdrawn for the blood alcohol test. Ms. Hyde later testified, however, that there was a possibility that she could be mistaken about the written form because some time had passed since the event took place and she encounters similar situations on a routine basis. We do not conclude from her testimony that there was a written consent form that was not produced by the State. Rather, Deputy Verner explained that he had only been employed as a law enforcement officer for a short period of time and simply forgot to have the Appellant sign a written consent form. He testified that he did ask the Appellant for the blood test, informed him that he had the right to refuse, and explained that he would lose his license for one year if he did refuse. Ms. Hyde's testimony substantially corroborated Deputy Verner's testimony in that she was confident that the consent was voluntarily given and that the Appellant never refused. She was only unsure as to whether a written form was signed by the Appellant. Despite the Appellant's allegations that the State has purposely withheld a written consent form signed by him, we do not find the evidence establishes that a written consent form exists and likewise do not find the testimony at trial to be "irreconcilable."

to questioning at the time the consent was given. Moreover, we note that the Appellant never objected to the introduction of this testimony at trial as being a discovery violation. Because we find no evidence in the record to suggest that the State has violated Rule 16(a)(1)(A) in either respect, we find this issue to also be without merit.

V. SCHEDULING ORDER

Lastly, the Appellant maintains that he was denied due process because the trial court's scheduling order did not set aside a sufficient amount of time for the Appellant to adequately prepare and participate in his defense. Specifically, the Appellant asserts that he was substantially prejudiced when the trial court denied all of his motions due to late filing.

An indictment in this case was returned on January 2, 2001. On January 8, 2001, the Appellant was arraigned without the benefit of counsel. At that time, the Appellant informed the court that he was not indigent and planned to retain private counsel. Ultimately, the Appellant retained counsel and, thereafter, counsel made his first court appearance on February 8, 2001. At that time, the trial court set the Appellant's trial date for February 22, 2001. Upon request by defense counsel, a continuance was granted by the trial court for an "elective surgery" the Appellant was scheduled to undergo and trial was reset for February 27, 2001. Trial counsel filed motions on February 20th and 21st.

Although the Appellant alleges that the trial court "summarily denied all motions without hearing," the record indicates otherwise. While the trial court did rule that the motions were untimely filed, the court nonetheless addressed all motions prior to trial and ultimately denied the relief sought. Thus, the Appellant suffered no prejudice, as each of his motions were heard and considered by the trial court.

In his brief, the Appellant further argues that the trial court "routinely extends the ten (10) day motions period of the scheduling order when counsel is retained after arraignment date" but failed to do so in this case. Again, the trial court addressed this concern prior to trial, stating that:

> [T]here are references [in your motions] that the Court usually gives ten days after the securing of counsel and things like that, and I do not know where you got that. That's simply not correct. Sometimes I will on - it's basically a case-by-case basis.

The trial court specifically rejected the Appellant's assertion that it had a set scheduling order and firmly stated that such orders were determined on a "case-by-case" basis. We agree with the trial court that the Appellant was not denied due process or prejudiced by the trial court's scheduling order. We find the Appellant had ample opportunity to file motions in compliance with the scheduling order and conclude that the trial court was more than accommodating when it addressed the motions after they were untimely filed. This issue is without merit.

CONCLUSION

Based upon the foregoing, we find all issues raised by the Appellant to be without merit and affirm the judgment of the Circuit Court of Carroll County.

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DAVID G. HAYES, JUDGE